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# Balakrishnan a/l Subramaniam v Penguasa Pusat Pemulihan Akhlak, Simpang Renggam, Johor Darul Takzim & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL ACTION NO S-21–137 OF 2008
ASMABI MOHAMAD JC
20 MAY 2013

*Tort — False imprisonment — Unlawful arrest by police — Allegation that detainee illegally arrested and/or detained — Claim for special damages for loss of income and livelihood and general, exemplary, aggravated and punitive damages — Whether basic rights guaranteed under Federal Constitution infringed — Whether there were elements of mala fide — Whether proper party had been sued — Entitlement to damages*

The plaintiff claimed for the tort of false imprisonment against the defendant and pleaded that his arrest and detention by the defendant from 5 December 2006 to 10 April 2007 was unlawful and an infringement of his basic rights as guaranteed by the Federal Constitution. It was the plaintiff's case that he was arrested by the police on 3 February 2006 and was taken to the police station and detained there for six days. After the six days' detention, the plaintiff was sent to the Special Branch Division and was further detained for two more weeks at the lock up. After the two weeks detention, the plaintiff was sent to the lock up at the police station where he was further detained for another 40 days. Then, he was ordered to be detained for a period of one year at the Simpang Renggam Rehabilitation Centre ('the Centre'). It was only on 29 November 2006 that the High Court granted habeas corpus to the plaintiff and the plaintiff was ordered to be released. However, the plaintiff was handed over by the prison warden to a policeman to re-arrest him. The plaintiff was sent again to the Centre to be detained for a period of another one year. The plaintiff submitted that he was illegally arrested and/or detained, causing him to lose his job and source of income. The arrest and detention had also caused him to suffer emotional distress, depression, embarrassment, severe shock and mental anguish, disturbance, sufferings and uncertainties. Therefore, the plaintiff claimed from the defendants for special damages for loss of income and livelihood and general, exemplary, aggravated and punitive damages. In their defence, the defendants pleaded that the two detention orders made pursuant to s 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ('POPOC') and the process leading to these two detentions were lawful and in accordance with the procedures as set in POPOC. The issues that arose in the present claim were whether the plaintiff could be arrested and detained based on the same grounds and the same statements as his first arrest and detention; whether there were breaches of arts 5(3) and (4) of the Federal

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Constitution ('FC'); whether the plaintiff was released from custody/adverse inference under s 114(g) of the Evidence Act 1950; whether there was contempt of court; whether there were elements of mala fide; whether the plaintiff's second arrest tantamount to res judicata; whether the proper party had been sued; and whether the plaintiff was entitled to damages.

**Held,** dismissing the claim with costs:

(1) Section 3(3) of the POPOC made no mention that the police could not use the same reasons and/or ground of the plaintiff's prior arrest and or detention to effect a subsequent arrest of the plaintiff for purposes of s 4(1) of the same Act (see para 24(c)).

(2) The plaintiff had not pleaded facts pertaining breaches of arts 5(3) and (4) of the FC and therefore his claim was rejected. Further, the said provision of arts 5(3) and (4) of the FC would not be applicable in a situation where the plaintiff was arrested and detained under preventive laws made pursuant to arts 149 and 150(6) of the FC. Therefore, if there were any incosistencies between the POPOC and the FC, the provision of POPOC would prevail (see para 45).

(3) The onus was on the plaintiff to prove his assertion on the standards required by the law which was on the balance of probabilities. However, the plaintiff had not shown evidence on the balance of probabilities that he was not released on 5 December 2006 but instead he was handed over to the police by the prison officer. The plaintiff had the opportunity of adducing the best evidence to prove his assertion as the relevant police officer was present in court on the day of hearing (see para 46).

(4) In view of the fact that the court was not vested with the power to question the third defendant's satisfaction or reasons to make the second detention order under s 4(1) of the POPOC based on the same facts and ground as the first detention, the second order though was based on the same facts and grounds as the first detention order could not be said to be an abuse of the court process or a contempt of court as claimed by the plaintiff. Therefore the plaintiff's detention order was valid and enforceable until it was revoked (see para 48).

(5) The onus was on the plaintiff to prove that his arrest was tainted with element of mala fide. In order to succeed, the plaintiff had to show improper and bad motive and a mere suspicion would not suffice. However, the plaintiff had not shown proof of existence of mala fide on the part of the defendants in all acts pertaining to the plaintiff's arrest, re-arrest and detention (see para 50).

(6) The issue before the High Court related to procedural non-compliance and did not touch the merits of the third defendant's satisfaction to make

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the second detention order pursuant to s 4(1) of the POPOC. Therefore, res judicata was a non-issue (see para 54).

(7) The public officer responsible for the alleged tortuous act must be cited as parties in the action. The plaintiff failed to identify and name the respective public officer whom the plaintiff alleged had committed the wrongdoings and/or the tortuous act that caused the plaintiff to be illegally arrested and/or detained. Hence, the plaintiff had not complied with the statutory requirement provided by Government Proceedings Act 1956 ('GPA') (see para 58).

(8) The plaintiff had not passed the test in order to deserve damages to be awarded by the court. There was no evidence adduced during the trial to show presence of elements of outrageousness, oppression or intentional wrongdoing on the part of the defendants. The plaintiff too had not shown the manner or circumstances in which the acts were said to be particularly appalling (see para 62).

**[Bahasa Malaysia summary**

Plaintif menuntut bagi tort penahanan salah terhadap defendan dan memplidkan bahawa penangkapan dan penahanannya oleh defendan dari 5 Disember 2006 hingga 10 April 2007 adalah menyalahi undang-undang dan satu pelanggaran hak asasinya yang dijamin di bawah Perlembagaan Persekutuan. Adalah kes plaintif bahawa dia ditangkap oleh pihak polis pada 3 Februari 2006 dan telah dibawa ke balai polis dan ditahan di sana selama enam hari. Selepas penahanan selama enam hari, plaintif dihantar ke Bahagian Cawangan Khas dan ditahan selanjutnya selama dua minggu di dalam lokap. Selepas penahanan selama dua minggu, plaintif dihantar ke lokap di balai polis di mana dia ditahan selanjutnya selama 40 hari. Selepas itu, dia diarahkan ditahan lagi bagi tempoh selama setahun di Pusat Pemulihan Simpang Renggam ('Pusat tersebut'). Hanya pada 29 November 2006 sahaja barulah Mahkamah Tinggi membenarkan habeas corpus kepada plaintif dan plaintif diarahkan agar dibebaskan. Walau bagaimanapun, plaintif diserahkan oleh warden penjara kepada pihak polis untuk tangkapan semula. Plaintif dihantar semula ke Pusat untuk ditahan bagi tempoh setahun lagi. Plaintif menghujahkan bahawa dia telah ditangkap/ditahan secara salah, menyebabkan dia hilang pekerjaannya dan sumber pendapatan. Tangkapan dan penahanannya juga menyebabkan dia mengalami tekanan emosi, kemurungan, malu, kejutan besar dan penderitaan mental, gangguan, derita dan ketidaktentuan. Oleh itu, plaintif menuntut daripada defendan-defendan bagi ganti rugi khas untuk kehilangan pendapatan dan mata pencarian dan ganti rugi am, teladan, teruk dan punitif. Dalam pembelaannya, defendan-defendan memplidkan bahawa kedua-dua perintah tahanan di bawah s 4(1) Ordinan Darurat (Ketenteraman Awam dan Mencegah Jenayah) 1969 ('ODKAM') dan proses yang membawa kepada dua penahanan ini adalah sah dan selaras dengan prosedur-prosedur dalam ODKAM. Isu-isu

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yang timbul dalam tuntutan ini adalah sama ada plaintif boleh ditangkap dan ditahan berdasarkan alasan-alasan dan kenyataan-kenyataan yang sama seperti penangkapan dan penahanan pertamanya; sama ada terdapat pelanggaran perkara 5(3) dan (4) Perlembagaan Persekutuan ('PP'); sama ada plaintif dilepaskan daripada jagaan/anggapan bertentangan di bawah s 114(g) Akta Keterangan 1950; sama ada terdapat penghinaan mahkamah; sama ada terdapat elemen-elemen mala fide; sama ada tangkapan kedua plaintif terjumlah kepada res judicata; sama ada pihak yang betul telah disaman; dan sama ada plaintif berhak ke atas ganti rugi.

**Diputuskan**, menolak tuntutan dengan kos:

(1) Seksyen 3(3) ODKAM tidak menyebut bahawa pihak polis tidak boleh menggunakan sebab dan/atau alasan plaintif sebelum penahanan dan/atau penahanan yang membawa kepada penahanan plaintif selanjutnya bagi tujuan s 4(1) Akta (lihat perenggan 24(c)).

(2) Plaintif tidak memplidkan fakta-fakta berkenaan pelanggaran perkara 5(3) dan (4) Perlembagaan Persekutuan dan oleh itu tuntutannya ditolak. Selanjutnya, peruntukan perkara 5(3) dan (4) Perlembagaan Persekutuan tidak akan terpakai dalam keadaan di mana plaintif ditangkap dan ditahan di bawah undang-undang pencegahan yang dibuat di bawah perkara 149 dan 150(6) dan Perlembagaan Persekutuan. Oleh itu, jika terdapat ketidakselarasan antara ODKAM dan PP, peruntukan ODKAM akan mengatasi semua (lihat perenggan 45).

(3) Beban terletak pada plaintif untuk membuktikan penegasannya mengenai standard-standard yang diperlukan oleh undang-undang iaitu atas imbangan kebarangkalian. Walau bagaimanapun, plaintif tidak menunjukkan sebarang keterangan atas imbangan kebarangkalian bahawa dia tidak dilepaskan pada 5 Disember 2006 tetapi sebaliknya dia diserahkan kepada pihak polis oleh pegawai penjara. Plaintif mempunyai peluang untuk mengemukakan keterangan terbaik untuk membuktikan hujahannya kerana pegawai polis yang relevan hadir dalam mahkamah pada hari perbicaraan (lihat perenggan 46).

(4) Melihat pada fakta bahawa mahkamah tidak mempunyai kuasa untuk mempersoalkan kepuasan defendan ketiga atau sebab-sebab untuk menjadikan perintah penahanan kedua di bawah s 4(1) ODKAM berdasarkan fakta dan alasan-alasan yang sama kerana penahanan pertama tidak boleh dikatakan satu salahguna proses mahkamah atau penghinaan mahkamah seperti yang didakwa oleh plaintif. Oleh itu, perintah penahanan plaintif adalah sah dan boleh berkuat kuasa hinggalah ia dibatalkan (lihat perenggan 48).

(5) Beban terletak pada plaintif untuk membuktikan bahawa penahanannya tercemar dengan elemen mala fide. Untuk berjaya, plaintif harus

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menunjukkan ketidakwajaran dan motif yang tidak baik dan syak wasangka semata-mata adalah tidak mencukupi. Walau bagaimanapun, plaintif tidak menunjukkan bukti kewujudan mala fide pada defendan-defendan dalam kesemua perlakuan berkenaan tangkapan, tangkapan semula dan penahanan plaintif (lihat perenggan 50).

(6) Isu di hadapan Mahkamah Tinggi adalah berkenaan ketidakpatuhan prosedur dan tidak menyentuh merit-merit kepuasan defendan ketiga untuk membentuk perintah penahanan kedua di bawah s 4(1) ODKAM. Oleh itu, res judicata bukanlah isu (lihat perenggan 54).

(7) Pegawai awam yang bertanggungjawab bagi tindakan yang didakwa bersifat tort tersebut menyatakan pihak-pihak dalam tindakan. Plaintif gagal mengenal pasti dan menamakan pegawai awam yang didakwa oleh plaintif telah melakukan salahlaku dan/atau tindakan tort yang menyebabkan plaintif ditangkap dan/atau ditahan secara salah. Oleh itu, plaintif tidak mematuhi keperluan statutori yang diperuntukkan oleh Akta Prosiding Kerajaan 1956 ('APK') (lihat perenggan 58).

(8) Plaintif tidak lulus ujian untuk mendapatkan ganti rugi untuk diawardkan oleh mahkamah. Tiada keterangan yang dikemukakan ketika perbicaraan untuk menunjukkan kewujudan elemen-elemen keterlaluan, penindasan atau salahlaku sengaja defendan-defendan. Plaintif juga tidak menunjukkan cara atau hal keadaan dalam mana tindakan-tindakan tersebut dikatakan khasnya teruk (lihat perenggan 62).]

**Notes**

For a case on unlawful arrest by police, see 12(1) *Mallal's Digest* (4th Ed, 2013 Reissue) para 863.

**Cases referred to**

*A v Bottrill* [2003] 1 AC 449, PC (refd)

*Abdul Razak bin Baharuddin & Ors v Ketua Polis Negara & Ors and another appeal* [2006] 1 MLJ 320, FC (refd)

*Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189; [1995] 3 CLJ 783, SC (refd)

*Bonham-Carter v Hyde Park Hotel Ltd* [1948] WN 89, KBD (refd)

*Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 MLJ 356 (refd)

*Foo Loke Ying & Anor v Television Broadcasts Ltd & Ors* [1985] 2 MLJ 35; [1985] CLJ (Rep) 122, SC (refd)

*Gunasingam a/l Kolasegaran dan lain-lain lwn Timbalan Menteri Keselamatan Dalam Negeri Malaysia dan lain-lain* [2006] 2 MLJ 363, HC (refd)

*Haji Abd Rahman v Government of Malaysia & Anor* [1966] 2 MLJ 174 (refd)

*Henderson v Henderson* (1843) 3 Hare 100, 67 ER 313 (refd)

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*Johara Bi binte Abdul Kadir Marican v Lawrence Lam Kwok Fou & Anor* [1981] 1 MLJ 139, FC (refd)
*Kam Teck Soon v Timbalan Menteri Dalam Negeri Malaysia & Ors and other appeals* [2003] 1 MLJ 321; [2003] 1 CLJ 225, FC (refd)
*Kapt (B) Haji Mohamad bin Ismail v Perwira Affin Bank Bhd* [2001] 5 MLJ 101; [2001] 5 CLJ 184, HC (refd)
*Kerajaan Malaysia & Ors v Lay Kee Tee & Ors* [2009] 1 MLJ 1; [2009] 1 CLJ 663 (refd)
*Kerajaan Malaysia & Ors v Nasharuddin Nasir* [2004] 1 CLJ 81, FC (refd)
*Lee Kew Sang v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2005] 3 CLJ 914, FC (refd)
*Letrik Bandar Hup Heng Sdn Bhd v Wong Sai Hong* [2002] 5 MLJ 247; [2002] 5 CLJ 170, HC (refd)
*Rookes v Barnard* [1964] AC 1129, HL (refd)
*Sasinthiran Balakrishnan v Ketua Polis Negara & Anor And Another Case* [2012] 1 CLJ 534, HC (refd)
*Steven Phoa Cheng Loon & Ors v Highland Properties Sdn Bhd & Ors* [2000] 4 MLJ 200, HC (refd)
*Sunlite Textile Sdn Bhd v Motilal Realty Sdn Bhd (Part 2)* [2007] 5 MLJ 640; [2008] 7 CLJ 9, HC (refd)
*Yeap Hock Seng @ Ah Seng v Minister of Home Affairs, Malaysia & Ors* [1975] 2 MLJ 279 (refd)

**Legislation referred to**

Civil Law Act 1956 s 3(1)
Emergency (Public Order and Prevention of Crime) Ordinance 1969 ss 3(1), (2), (3), 4(1), (4), 7B, 7B(1), 7C, 7D
Evidence Act 1950 ss 101, 106, 114(g)
Federal Constitution arts 5, 5(1), (3), (4), 7, 149, 150(6), 151
Government Proceedings Act 1956 ss 5, 6, 6(1), (4)

*G Subramaniam Nair (Ebrina bt Zubir with him) (Maniam Nair & Co) for the plaintiff.*
*Mariam Hasanah bt Othman (Norhasmanita bt Abdul Manap with her) (Federal Counsel, Attorney General's Chambers) for the defendants.*

**Asmabi Mohamad JC:**

INTRODUCTION

**[1]** The plaintiff's writ action against the defendants was for the tort of false imprisonment (wrongful detention) and for contempt of court. In the plaintiff's writ and statement of claim dated 30 May 2008 ('SOC') the plaintiff pleaded that his arrest and detention by the defendants from 5 December 2006 to 10 April 2007 was unlawful and an infringement of his basic rights as

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guaranteed by the Federal Constitution. The plaintiff claimed for special damages for loss of income and livelihood for the whole duration that he was unlawfully arrested and/or detained as well as general, exemplary, aggravated and punitive damages. The plaintiff's claim for damages also covered the period he was detained from 3 April 2006 to 5 December 2006.

**[2]** The defendants disputed the plaintiff's claim and in their defence to the plaintiff's claim, the defendants pleaded that two detention orders made pursuant to s 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ('POPOC') and the process leading to these two detentions were lawful and in accordance with the procedures as set out in POPOC. The defendants further claimed that as the plaintiff's arrest and detention were justified and lawfully made pursuant to the clear authority of the law, the defendants were not liable to pay damages to the plaintiff whether special, general, aggravated, exemplary or punitive. Further, the defence raised the issue of limitation and that the proper party and/or the tortfeasors had not been named in this action.

**[3]** This case proceeded by way of a full hearing with one witness having testified for the plaintiff and two witnesses testified for the defendants.

**[4]** After giving full consideration to the evidence, both documentary as well as testimonial, and the submissions by both learned counsel for the plaintiff and the defendants, on 13 February 2013 I dismissed the plaintiff's claim with costs. After a brief submissions on costs I awarded costs, of RM30,000 to the defendants.

**[5]** Aggrieved by the said decision, the plaintiff filed an appeal to the Court of Appeal Malaysia against the whole of the said decision.

## THE DOCUMENTS

**[6]** At the outset of the trial, both learned counsel had agreed to dispense with the marking of the documents individually as exhibits and for these agreed documents to be deemed accepted as exhibits and be referred to in the manner these documents were paginated in the agreed bundles of document marked as 'B1' and 'B2' respectively. The relevant documents referred to in the course of this trial were as follows:

| Documents | Marked |
|---|---|
| i. the pleadings | Document 'A' |
| ii. common bundle of documents | Document 'B1' |
| iii. additional common bundle of documents | Document 'B2' |

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| | |
|---|---|
| iv. issues to be tried | Document 'C1' |
| v. issues to be tried (additional) | Document 'C2' |
| vi. statement of agreed facts | Document 'D' |
| vii. plaintiff's summary of case | Document 'E' |
| viii. defendants' summary of case | Document 'F' |

ISSUES TO BE TRIED

[7] Both parties had framed two sets of issues to be tried (documents marked as 'C1' and 'C2' respectively). For ease of reference, all the issues stated in the documents marked as C1 and C2 are reproduced as follows:

*Issues in C1*

(a) whether the detention of the plaintiff from 5 December 2006 to 10 April 2007 amounted to a wrongful detention and a contempt of the court order;

(b) whether the plaintiff is entitled to aggravated and/or exemplary and/or punitive damages;

(c) whether it had been proved that the first defendant had informed the police about the release of the plaintiff pursuant to the order of the court dated 29 November 2006 and whether the first defendant had delayed in releasing the plaintiff and or that the first defendant or his agent had handed over the plaintiff to the police;

(d) whether the re-arrest of the plaintiff under s 3(1) of the POPOC by the second defendant and the continuous detention of the plaintiff from 5 December 2006 to 18 January 2007 in the police lock up at the Johor Bahru, Central Police Station, was illegal and an act in excess of the powers conferred by the law and a contempt of the court order;

(e) whether there were breaches of arts 5, 7, and 151 of the Federal Constitution, in that, the detention of the plaintiff from 5 December 2006 to 10 April 2007 was illegal and not in compliance with the requirement of the law and an action tainted with mala fide without fresh evidence having been produced and tantamount to a double jeopardy;

(f) whether the plaintiff's detention by the third defendant was protected under s 7D of the POPOC;

(g) whether the fourth defendant was the employer of the first, second, and third defendants;

(h) Whether the third defendant was vested with the powers under s 4(1) of the POPOC to issue the detention order based on the old grounds, facts, file and inquiry report. this was because, the first detention order which

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was based on the same facts had been declared as null and void by the Johor Bahru High Court on 29 November 2006;

*Issues in C2*

(i) whether the third defendant is the employer of the second defendant and vicariously liable for the acts of the second defendant;

(j) whether the plaintiff ought to have challenged the detention order dated 19 January 2007 by way of judicial review as provided under s 7C of the POPOC; and

(k) whether the detention order issued by the third defendant from 3 April 2006 to 5 December 2007 and further detention from 19 January 2007 to 10 April 2007 was protected by s 7D of the POPOC and could not be challenged via this writ action.

THE PLAINTIFF'S CASE

**[8]** The plaintiff's only witness, one Balakrishnan a/l Subramaniam ('PW1') was 56 years old at the time he testified before me. Prior to his detention under POPOC, the plaintiff was working as a Regional Manager (Southern) of Benteras Security (M) Sdn Bhd. According to the plaintiff, he was arrested by the police on 3 February 2006 at about 10pm at a coffee shop at Jalan Teratai, Johor Jaya, Johor with two others and was taken to Tampoi Police Station and detained thereon for a period of six days. After the six days' detention at Tampoi Police Station, the plaintiff was sent to the Special Branch Division of the Johor Bahru Police Contingent ('IPK') and was further detained for two more weeks at the lock up of the IPK. After the two weeks detention, the plaintiff was sent to the lock up at Tampoi Police Station where he was further detained for another forty days.

**[9]** After being in detention for a period of sixty days pursuant to ss 3(1) to 3(3) of the POPOC and vide an order made by the third defendant on 3 April 2006, the plaintiff was ordered to be detained for a period of one year at the Simpang Renggam Rehabilitation Centre, Johor ('Centre') with effect from 4 April 2006 pursuant to s 4(1) of the POPOC (pp 1–4 of B1). Whilst being in detention and around 22 June 2006 when the inquiry pertaining to the plaintiff's representation was being heard by the Advisory Board, the plaintiff moved the Johor Bahru High Court (2) for a habeas corpus to be issued by the said court. On 29 November 2006 the said High Court had granted the habeas

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corpus sought by the plaintiff and the plaintiff was ordered to be released forthwith (p 5 of B1). A

**[10]** As soon as the habeas corpus had been served on the first defendant, the plaintiff was notified of the order by one of the first defendant's agents. On 5 December 2006 at about 3.15pm, the plaintiff was escorted to the detainees records office at the centre. While the plaintiff was waiting for the documentation pertaining to his release was being processed, one of the first defendant's agents had contacted Kluang Police Station to inform the said station of the plaintiff's release. After having waited at the detainees records office for almost two hours, around 5pm the plaintiff was escorted out by a prison warder to a prison van. In the van, the plaintiff over heard another prison warder making inquiries with someone via a walkie talkie as to whether there would be policemen waiting for the plaintiff outside the centre. The said prison warder had been informed that someone would be waiting for the plaintiff outside the main gate of the centre. Shortly after that, the prison van stopped parallel to a police van which was already parked outside the main gate of the centre. B C D

**[11]** The plaintiff was handed over by the prison warder to a policeman whom the plaintiff identified as Corp Murugiah a/l P Maniam (now sergeant detective) who had come with four other policemen to the centre to re-arrest him. The plaintiff was then taken to Kluang Police Station and detained in the lock up for a day. At about 10am the next day, a police sergeant and two other policemen from IPK (Cawangan D7), Johor Bahru escorted the plaintiff to the Johor Bahru Central Police lock up where he was further detained, for 45 days. On the 45th day of his detention the plaintiff was served with another detention order dated 19 January 2007 ('second detention order') made by the third defendant pursuant to s 4(1) of the POPOC based on the same facts and grounds of his first detention order (pp 6–9 of B1). The plaintiff was again sent to the centre to be detained for another period of one year with effect from 19 January 2007. E F G

**[12]** An inquiry was conducted by the advisory board on 22 February 2007 and the advisory board had recommended to the Yang Di-Pertuan Agong that the second detention order be revoked and the plaintiff be released from the centre. The second detention order was revoked pursuant to s 7B(1) of the POPOC on 10 April 2007 (p 10 of B1). On the same day the plaintiff was released from the centre. H

**[13]** The plaintiff claimed that he was illegally arrested and/or detained causing him to lose his job and source of income as a Regional Manager (Southern) Banteras Security (M) Sdn Bhd. The arrest and detention had caused the plaintiff and his family to suffer emotional distress, depression, I

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embarrassment, severe shock and mental anguish, disturbance, sufferings and uncertainties. During this time, the plaintiff was denied of his personal liberties, a right he was entitled to enjoy as a lawful citizen of the country which is guaranteed in the Federal Constitution.

**[14]** Therefore the plaintiff claimed from the defendants for special damages for lost of income and livelihood, general, exemplary, aggravated and punitive damages. The plaintiff claimed that he was entitled for damages as claimed in para 17 of the SOC for the period of his detention from 3 April 2006 to 5 December 2006, which was in respect of the first detention order, the period between 5 December 2006 to 18 January 2006 in respect of his second arrest by the second defendant and his detention in respect of the second detention order from 19 January 2007 to 10 April 2007.

THE DEFENDANTS' CASE

**[15]** The first defendant was represented by one Nik Mohd Faidza bin Nik Jaafar, Senior Assistant Superintendent of Prisons ('DW1') who was the controller of the centre around 2006 to 2007, the time the plaintiff was detained pursuant to s 4(1) of the POPOC. On 4 April 2006, DW1 was served with the first detention order issued by the third defendant ('first detention order'). On this date, the plaintiff was handed to DW1 to be detained at the said centre for a period of one year (at p 1 of B1) pursuant to the first detention order made by the third defendant. The plaintiff was placed in the custody of DW1 from 4 April 2006 until a habeas corpus order (p 5 of B1) was served on DW1 on 5 December 2006 for the release of the plaintiff from DW1's custody forthwith. As soon as the habeas corpus order had been served on DW1, DW1 proceeded to make the necessary arrangements to effect the release of the plaintiff from the centre. As soon as all documentations pertaining to the plaintiff's release were prepared, the plaintiff was released from the custody of DW1 without further delay.

**[16]** On 20 July 2007, DW1 was served with another detention order made by the third defendant pursuant to s 4(1) of the POPOC ('second detention order') relating to the same detainee, the plaintiff herein (at p 6 of B1). The second detention order was for a period of one year with effect from 19 January 2007.

**[17]** DW1 testified that he was never served with a revocation order made pursuant to s 7B of the POPOC (p 10 of B1) and reiterated that if a copy of the said revocation order had been served on him he would have made the necessary arrangements to release the plaintiff from his custody. DW1 could not recall any instance where a particular detainee was still being detained despite the revocation order having been served on the controller of the centre.

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As far as DW1 could recall, there was only one habeas corpus order having been served on him at the time he was the controller of the centre, which was on 5 December 2006 which he had acted upon as promptly as he could remember.

**[18]** The defendants' second witness was Dato' Law Hong Soon, Assistant Commissioner of Police, who is attached to Headquarters of the Sarawak Police Contingent, Kuching, Sarawak ('DW2'). Around the year 2006 to 2007, DW2 was the Chief Assistant Director ('D7'), at the Department of Criminal Investigation, Bukit Aman, Kuala Lumpur. DW2 had directed for the plaintiff to be arrested pursuant to s 3(1) of the POPOC pending further investigation as DW2 had sufficient reason to believe that there were reasonable grounds to justify the plaintiff's detention under s 4(1) of the POPOC. DW2 had reason to believe that the plaintiff having acted, or being about to act or being likely to act any in manner prejudicial to public order and/or DW2 had reason to believe that the arrest was necessary for the suppression of violence or prevention of crimes involving violence.

**[19]** In the course of his duties in the said division, DW2 had also become aware of the habeas corpus order having been issued by the Johor Bahru High Court for the release of the plaintiff from the custody of the centre. Despite the habeas corpus order having been issued by the said court for the release of the plaintiff from detention, DW2 had given instruction for the plaintiff to be arrested because DW2 had reason to believe that there were reasonable grounds to justify the plaintiff's detention under s 4(1) of the POPOC. Further just like the first arrest in respect of the first detention order, DW2 too had reason to believe that the plaintiff having acted, or being about to act or being likely to act any in any manner prejudicial to public order and/or DW2 had reason to believe that the arrest was necessary for the suppression of violence or prevention of crimes involving violence.

**[20]** According to DW2, the habeas corpus order was issued by the court as a result of the non-compliance of the procedures stipulated in POPOC on the part of the detaining authority which rendered the detention void for want of procedure and that the merit of the detention was not an issue before the said High Court. Upon compliance with the relevant procedures and requirements under POPOC, DW2 had communicated to the Secretary General of Ministry of Internal Security about the plaintiff's arrest and requested the Minister concern to consider issuing an order pursuant to s 4(1) of the POPOC to detain the plaintiff, as DW2 had reason to believe that there were grounds which would justify his detention under s 4(1) of the POPOC. The same was issued by the third defendant after having satisfied himself that it was necessary to detain the plaintiff who was a threat to public security and order.

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**[21]** The plaintiff was then placed in the custody of the centre with effect from 19 January 2007 until the said second detention order was revoked vide a revocation order dated 10 April 2007 (p 10 of B1).

**[22]** According to DW2, the plaintiff was validly arrested and detained by the police and in effecting the plaintiff's arrest and detention the defendants had complied with all the relevant procedures stipulated in POPOC. Therefore there were no grounds for the plaintiff to challenge the arrest and/or detention and/or claimed from the defendant damages as pleaded in the SOC.

ISSUES RAISED BY THE RESPECTIVE PARTIES

*By the plaintiff*

**[23]** In the written as well as oral submissions, learned counsel for the plaintiff had raised, amongst others, the following issues:

(a) the fact that the habeas corpus had been issued by the Johor Bahru High Court proved that the first detention order made by the third defendant was null and void. Further, the respondents in the habeas corpus application had not challenged the issued by the said High Court. Therefore the plaintiff was entitled automatically to damages for false imprisonment and/or wrongful detention for his unlawful detention pursuant to the first detention order;

(b) the plaintiff's re-arrest and detention by the police for 46 days from 5 December 2006 to 19 January 2007 was unlawful and tainted with mala fide. The plaintiff was not released from custody despite a had been granted by the Johor Bahru High Court. Instead, the plaintiff was handed over to the police. There is no provision for the police to re-arrest the plaintiff after the habeas corpus had been granted;

(c) the failure of the second defendant to comply with the habeas corpus order tantamount to contempt of the Johor Bahru High Court order dated 29 November 2006;

(d) there is no provision for the plaintiff to be re-arrested upon his release pursuant to the High Court order. The plaintiff in this case was re-arrested based on the same reasons he was arrested and detained under the first detention order;

(e) the action of the first defendant in handing over the plaintiff to the policemen from the Kluang Police Station and the re-arrest of the plaintiff in the vicinity of the centre by these policemen without new statements being recorded was wrongful and in breach of art 5(1) of the Federal Constitution. The action of the police was tainted with mala fide;

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(f) there were no documents to prove that the plaintiff was lawfully detained.

(g) the second detention order made by the third defendant based on the same grounds as in the first detention order was unlawful and contrary to the law. The second detention order which was based on an earlier arrest which was unlawful was also unlawful. Therefore the plaintiff was automatically entitled to damages for wrongful imprisonment and/or unlawful detention.

(h) There were breaches of arts 5, 7 and 151 of the Federal Constitution.

(i) The plaintiff had established liability and entitled to damages as prayed.

*By the defendants*

**[24]** Learned federal counsel for the defendants raised the following issues:

(a) the plaintiff had not proved that the third defendant had acted under s 4(1) of the POPOC based on the same grounds and statement of facts that were submitted by the police. The police was vested with the powers to re-arrest the plaintiff under s 3(1) of the POPOC;

(b) the second defendant had given instruction for the plaintiff to be arrested as he had reason to believe that there were grounds which would justify the detention under s 4(1) of the POPOC, with a view to preventing the plaintiff from acting in any manner prejudicial to public order or it is necessary for the suppression of violence or prevention of crimes involving violence.

(c) s 3(3) of the POPOC made no mention that the police could not use the same reason to re-arrest the plaintiff for purposes of s 4(1) of the POPOC. Therefore the plaintiff's detention under ss 3(1) and (3) of the POPOC was lawful and in accordance with the provision of the POPOC;

(d) in regards the plaintiff's claim that there was infringement of his constitutional rights guaranteed under the Federal Constitution, the plaintiff had not pleaded these facts in his SOC. Therefore this submission on unpleaded facts must be rejected by this court;

(e) as it was the plaintiff who had asserted that he was not released from custody despite the having been issued for his release and this being a writ action for false imprisonment, the onus of proving that the detention is unlawful was on the plaintiff and not on the detaining authority as suggested by learned counsel for the plaintiff;

(f) the plaintiff's claim that he was illegally detained under s 4(1) of the POPOC was without any basis as the third defendant's satisfaction to

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detain the plaintiff under the said section could not be challenged in view of the provision of ss 7C and 7D of the POPOC;

(g) as regards the issue of whether the plaintiff's re-arrest and the second detention tantamount to a contempt of court, learned federal counsel submitted that the plaintiff shall be entitled to challenge the detention but limited only to the issue of non-compliance of procedural requirement and nothing else. The third defendant's satisfaction under s 4(1) could not be subject to a review in view of the clear language of ss 7C and 7D of the POPOC which had been affirmed by judicial pronouncement by the apex court of the country;

(h) as to the reason that the re-arrest was tainted with element of mala fide, the law had placed the onus to prove the element of mala fide on the plaintiff. The plaintiff had not shown proof of existence of mala fide on the part of the defendants in all acts pertaining to the plaintiff's arrest and detention. The plaintiff had to show improper and bad motive. A mere suspicion would not suffice;

(i) as regards whether the plaintiff's second arrest tantamount to res judicata, learned federal counsel submitted that the challenge of the third defendant's decision by way of a habeas corpus only relates to non-compliance of procedural requirement stipulated in POPOC and did not affect the merits of the third defendant's satisfaction which justified the second detention order. Sections 7C and 7D had clearly ousted the court's jurisdiction to review the grounds of the third defendant's decision and/or satisfaction to make the detention order under s 4(1) of the POPOC.

(j) the plaintiff had failed to cite the tortfeasor in this action despite the fact that he was able to identify the person who had caused him to be arrested and detained. As such, the plaintiff had not complied with the provision of ss 6(1) and (4) of the Government's Proceedings Act 1956.

(k) pertaining to the issue of vicarious liability, the third defendant could not and were not vicariously liable for all acts of the the first and second defendants. The plaintiff had neglected to name the police officers whom the plaintiff claimed had committed the tort of wrongful arrest and/or detention against him. In order for the fourth defendant to be vicariously liable the tortfeasors, if any, ought to have been cited as parties to the current proceedings;

(l) The plaintiff alleged that his re-arrest by the second defendant and his detention from 5 December 2006 to 19 January 2007 under s 3(1) of the POPOC was unlawful and not in accordance with POPOC. The reasons as stated in annexure 'E' attached to the order dated 19 January 2007 in respect of the second detention order were similar to the first detention order dated 3 April 2006. However, these statements were

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prepared by the Ministry based on their inquiries and investigations submitted by the police. The plaintiff had failed to prove that the police had used the same facts and offences as submitted by the police;

(m) the second defendant was vested with the powers to arrest the plaintiff if the second defendant suspected that the plaintiff having acted or being about to act or likely to act in any manner prejudicial to public order or if the second defendant had reason to believe that it was necessary for the suppression of violence or prevention of crimes involving violence;

(n) on the issue of plaintiff's entitlement to damages, the plaintiff had failed to prove that he was entitled to special damages for loss of livelihood as a result of his detention as the plaintiff had not adduced any evidence to show evidence that he was gainfully employed. At the time of his arrest and/or detention; and

(o) likewise the plaintiff too had failed to prove that he was entitled to damages, be it general, aggravated, exemplary or punitive as the plaintiff had not proved his case fell under the circumstances that warranted the award of such damages. In the event liability is established, learned federal counsel submitted that a figure of between RM10,000 to RM12,000 would be appropriate.

## FINDINGS OF THE COURT

### *Burden of proof*

**[25]** The law on the burden of proof is governed by the provisions found in Chapter VII of Part III of the Evidence Act 1950 ('the Act'). Pursuant to s 101 of the Act, the legal burden of establishing the facts pleaded against the defendants is on the plaintiff. At the conclusion of the case, this court has a duty to determine whether sufficient evidence had been adduced by the plaintiff to prove his case on the balance of probabilities and/or beyond reasonable doubt, depending on what is appropriate and applicable to the plaintiff's pleaded case.

**[26]** Pursuant to s 106 of the Evidence Act 1950, the burden to prove any facts which is especially within the knowledge of the plaintiff lies on the plaintiff.

**[27]** In *Johara Bi binte Abdul Kadir Marican v Lawrence Lam Kwok Fou & Anor* [1981] 1 MLJ 139 (FC), His Lordship Chang Min Tat FJ approved the judicial approach of the High Court that until and unless a plaintiff has discharged the onus on him to prove his case on a balance of probabilities, the burden does not shift to the defendants and no matter if the defendants' case

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was completely unbelievable, the claim against the defendants must be dismissed.

*Jurisdictional point*

**[28]** I propose to deal with the issue whether the plaintiff herein could commence an action in the High Court claiming for damages for the common law tort of false imprisonment in respect of the first detention order for the period from 3 April 2006 to 5 December 2006 and the second detention order for the period between 19 January 2007 to 10 April 2007.

**[29]** It would be appropriate at this juncture for this court to examine the relevant provisions in POPOC in order to decide the issue at hand. Sections 7C and 7D of the POPOC provide as follows:

> 7C Judicial review of act or decision of Yang di-Pertuan Agong and Minister.
>
> (1) There shall be no judicial review in any court of, and no court shall have or exercise any jurisdiction in respect of, any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power in accordance with this Ordinance, save in regard to any question on compliance with any procedural requirement in this Ordinance governing such act or decision.
>
> ...
>
> 7D Interpretation of 'judicial review'
>
> In this Ordinance, 'judicial review' includes proceedings instituted by way of-
>
> (a) an application for any of the prerogative orders of mandamus, prohibition, and certiorari;
>
> (b) an application for a declaration or an injunction;
>
> (c) a writ of; and
>
> (d) any other suit, action or other legal proceedings relating to or arising out of any act done or decision made by the Yang di-Pertuan Agong or by the Minister in accordance with this Ordinance.

**[30]** The first and second detention orders were made by the third defendant pursuant to s 4(1) of the POPOC. In these two orders, the third defendant had stated that he was satisfied that it was necessary to detain the plaintiff with the view of preventing the plaintiff from acting in any manner prejudicial to public order and for the suppression of violence and/or prevention of crimes involving violence. Annexed to these two orders were the statements of the grounds and allegations of facts on which these two orders were based pursuant to s 4(4) of the POPOC which had also been furnished to the plaintiff at the time the first and Seconddetention orders were served on the plaintiff.

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**[31]** As I had stated earlier in respect of the first detention order, the Johor Bahru High Court had issued a habeas corpus ordering the release of the plaintiff from the detention on the grounds of non-compliance with the procedural requirement in s 4(1) of the POPOC. The plaintiff had not challenged the second detention order by way of a habeas corpus. The second detention order was revoked pursuant to s 7B(1) of the POPOC on 10 April 2007 (p 10 of B1).

**[32]** The reading of the provision of s 7C of the POPOC would clearly show that the common law claim of damages for false imprisonment is ousted by this section of POPOC. The language of this section is clear, plain and unambiguous. This section only confers jurisdiction on the courts to determine questions concerning compliance with any procedural requirements stipulated in POPOC and nothing else.

**[33]** This is further enhanced by the provision of s 7D where the words 'judicial review' in that section had been given an extended meaning by Parliament to include proceedings instituted by way of:

(a) application for mandamus, prohibition and certiorari;

(b) application for declaration or injunctions;

(c) *habeas corpus*; and

(d) any other suit, *action* or legal proceedings *relating to or arising out of any act done or decision* made by the Minister in accordance of the POPOC. (Emphasis added.)

**[34]** The provisions of ss 7C and 7D of the POPOC are clear, plain and unambiguous and needed no further interpretation. Hence the duty of the court at this juncture is to give effect to the clear words of the Legislature as intended by Parliament. In *Foo Loke Ying & Anor v Television Broadcasts Ltd & Ors* [1985] 2 MLJ 35; [1985] 1 CLJ 511; [1985] CLJ (Rep) 122 the court held:

> On the presumption that Parliament does nothing in vain, the court must endeavour to give significance to every word of an enactment, and it is presumed that if a word or phrase appears in a statute, it was put there for a purpose and must not be disregarded.

(see *Kerajaan Malaysia & Ors v Nasharuddin Nasir* [2004] 1 CLJ 81 at p 95).

**[35]** The case on point is the case of *Lee Kew Sang v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2005] 3 CLJ 914 where the Federal Court had this to say:

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A The cases decided prior to the amendments, ie 24 August 1989, showed various grounds upon which the detention orders were challenged. Mala Fide appeared to be the most common ground. Courts appear to have placed lesser importance on procedural non-compliance unless requirement was mandatory in nature. The amendments appear to have reversed the position and in so doing limited the B ground to only one ground ie, non compliance with procedural requirements.

**[36]** The decision in *Lee Kew Sang v Timbalan Menteri Dalam Negeri Malaysia & Ors* was affirmed by the Federal Court in the case of *Abdul Razak bin Baharuddin & Ors v Ketua Polis Negara & Ors and another appeal* [2006] 1 C MLJ 320 where the Federal Court held:

Even though in the course of our judgment we did point out that the provisions of ss 7C and ID of POPC were the same as the provisions of ss 8B and 8C of ISA and that both the amendments took effect on the same date (24 August 1989), in that case we only decided on the effects of ss 7C and ID of POPC. Now, in these appeals, D we think we should categorically decide on the effects of ss 8B and 8C of ISA.

**[37]** Based on the foregoing, a challenge of the first and second detention orders by the plaintiff by way of habeas corpus could only be made on the E grounds of non-compliance with the statutory procedures stipulated in POPOC. The court hearing the habeas corpus could only rely on all affidavits filed by the respective parties touching issues whether the procedures which had been outlined in POPOC had been complied with by the detaining authority. The court has no jurisdiction to embark on the mission to determine F the issue of the merits of the detention and/or the merits of the third defendant's satisfaction in making the order under s 4(1) of the POPOC.

**[38]** The proceedings in the habeas corpus ought to be distinguished from G the writ action for common law tort of false imprisonment such as the case at hand. In a habeas corpus, the challenge was only in respect of procedural non-compliance by the detaining authority whereas in an action under the common law tort of false imprisonment, the plaintiff would have to show absence or excess of jurisdiction on the part of the defendants. The remedy in H a habeas corpus is the immediate release of the corpus from a restraint. This principle had been well illustrated by RJ Sharpe in the learned author's book entitled *The Law of Habeas Corpus* as follows:

False imprisonment is not a remedy which takes the place of habeas corpus as it will not ordinarily be used to obtain immediate release from a restraint, but it does I afford one means of redress for anyone who has been unlawfully imprisoned. The civil action in damages will only succeed where there has been absence or excess of jurisdiction. Moreover, it by no means follows that success on habeas corpus, even on the grounds of jurisdictional error will afford the basis for an action in false imprisonment. The matter is not res judicata ...

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**[39]** Hence the fact that a habeas corpus had been issued by the High Court would not grant an automatic right to the plaintiff to damages as claimed herein. In the common law tort of false imprisonment, the plaintiff still had the evidentiary burden to prove that his detention was unlawful and for this court to decide on the issue of liability first before making the award for damages as prayed. The plaintiff has a duty to prove his case on the balance of probabilities that he was unlawfully arrested and/or detained, demonstrating that there was absence or excess of jurisdiction on the part of the defendants.

**[40]** Further, I am of the view that this court has no jurisdiction to award damages for false imprisonment as the provision only allowed the court to determine limited issues, in that, only on any question involving procedural non-compliance with any procedural requirement of POPOC. This interpretation is also in tandem with the intent and spirit of s 3(1) of the Civil Law Act 1956 which authorised this court to apply the common law in so far as the circumstances permit and save where no provision has been made by statute (see the case of *Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 MLJ 356). Hence the common law is ousted by the clear provision of ss 7C and 7D of the POPOC.

**[41]** In view of the above, the plaintiff's claim for damages in respect of the first and second detention orders must fall based on jurisdictional point alone.

*Whether the plaintiff could be arrested and detained based on the same grounds and the same statements as his first arrest and detention*

**[42]** The plaintiff had not proved that the third defendant had acted under s 4(1) of the POPOC based on the same grounds and/or the same statement of facts that were submitted by the police. Even assuming that the grounds of detention and the statement of facts were similar to the grounds and statements of facts in the first detention order, there is nothing to stop the detaining authority from re-arresting the plaintiff as the police was vested with the powers to re-arrest the plaintiff under s 3(1) of the POPOC.

**[43]** The second defendant had given instruction for the plaintiff to be arrested as he had reason to believe that there were grounds which would justify the detention under s 4(1) of the POPOC, with a view to preventing the plaintiff from acting in any manner prejudicial to public order or it is necessary for the suppression of violence or prevention of crimes involving violence. Under s 3(3) of the POPOC, certain categories of police officers are vested with the powers to detain any person for the purpose mentioned herein for the period specified under s 3(3) of the POPOC, the maximum of which is 60 days. After the 60 days period had lapsed, a police officer of or above the rank of Deputy Superintendent shall report to the police officer designated by the

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Inspector-General of Police ('IGP') or any officer designated by the IGP who shall then report the same to the Minister.

**[44]** Section 3(3) of the POPOC made no mention that the police could not use the same reasons and/or grounds of the plaintiff's prior arrest and/or detention to effect a subsequent arrest of the plaintiff for purposes of s 4(1) of the POPOC. This argument is supported by the case of *Sasinthiran Balakrishnan v Ketua Polis Negara & Anor And Another Case* [2012] 1 CLJ 534. In this case, the applicant had alleged that his re-arrest by the detaining authority as soon he was released from the rehabilitation centre amounted to contempt of court. The court rejected the applicant's contention and held that the police is provided with wide powers under s 3(1) to detain any person whom they viewed as having been involved in criminal activities involving violence for purposes of s 4(1) of the POPOC. The court went on to say that POPOC is silent as to whether the police could not use the same reasons for the re-arrest of the person. Therefore, the plaintiff's re-arrest after he was released pursuant to a habeas corpus was lawful and was not an act of false imprisonment.

*Whether there were breaches of arts 5(3), 5(4) of the Federal Constitution*

**[45]** In regards the plaintiff's claim that there was infringement of his constitutional rights as guaranteed under the Federal Constitution, the plaintiff had not pleaded the facts pertaining to the alleged breaches in his SOC. Therefore this claim must be rejected by the court. Further, the provision of arts 5(3) and 5(4) of the Federal Constitution shall not be applicable in a situation where the plaintiff was arrested and detained under preventive laws made pursuant to arts 150(6) and 149 of the Federal Constitution. Therefore, if there are any inconsistencies between POPOC and the Federal Constitution, the provision of POPOC shall prevail. In *Kam Teck Soon v Timbalan Menteri Dalam Negeri Malaysia & Ors and other appeals* [2003] 1 MLJ 321; [2003] 1 CLJ 225 the Federal Court held as follows:

> I am of the view that if s 3(1) is inconsistent with art 5(3) then s 3(1) must prevail over art 5(3). This would save arrest and detention which would have been unlawful because of violation of art 5(3). This in my view is the purpose of art 150(6) FC ...

*Whether the plaintiff was released from custody/Adverse Inference under s 114(g) of the Evidence Act 1950*

**[46]** It was the plaintiff who asserted that he was not released from custody despite the habeas corpus order having been served on the first defendant. The plaintiff alleged that the first defendant's agent had not released him from the centre but had instead handed him over to a police team from Kluang Police Station headed by one Corporal Murugiah a/l P Maniam (*now Sergeant*

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*Detective*) who was already outside the centre at the time the plaintiff was escorted out of the centre to be released. Therefore, the onus was on the plaintiff to prove this assertion on the standard required by the law, which was on the balance of probabilities.

Having evaluated the evidence of the PW1 in court, I am satisfied that the plaintiff had not shown evidence on the balance of probabilities that he was not released on 5 December 2006 but instead he was handed over to the police by the prison officer. The plaintiff had the opportunity of adducing the best evidence to prove his assertion that he was handed or to put it crudely he was bundled and handed over to the police the minute he was escorted out of the Centre, as the relevant police officer who was present at the time of the plaintiff's release and alleged re-arrest was present in court on the day of the hearing. This particular officer was identified by name in the plaintiff's witness statement (WS-PW1).

**[47]** I had also noted that the plaintiff had applied for a subpoena to be issued to secure the attendance of sergeant detective Murugiah a/l P Maniam, as the plaintiff's witness. In complying with the subpoena issued by the court, sergeant detective Murugiah a/l P Maniam had come all the way from IPK Johor, to testify for the plaintiff. However for reasons only known to the plaintiff this material witness who would be able to shed some lights pertaining to the plaintiff's release and re-arrest was not called despite being present in court on the day the plaintiff commenced his case. The plaintiff decided to close his case without calling sergeant detective Murugiah a/l P Maniam to corroborate his version of no release and alleged re-arrest. Learned counsel for the plaintiff had sought the court's permission to release two officers who were issued subpoenas to be present as the plaintiff's witnesses because the plaintiff decided not to put them on the stand.

Although the plaintiff had the prerogative to call any witnesses he wished to, the decision not to call a material witness who had been issued a subpoena and already present in court at the date of the hearing would definitely attract some concern on the part of the court. This witness was clearly identified by the plaintiff in his WS-PW1. This particular witness was at the scene at the time of the plaintiff's release and alleged re-arrest. The circumstances concerning the plaintiff's release and re-arrest was very much in issue and could very well be explained by sergeant detective Murugiah a/l P Maniam. Given these facts this court is entitled to invoke the provision of s 114(g) of the Evidence Act 1950, in that, if sergeant detective Murugiah a/l P Maniam were to be called to the witness stand, the evidence would be adverse to the plaintiff's case.

*Was there contempt of court*

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**[48]** The next issue to be considered is whether the plaintiff's re-arrest on 5 December 2006 and his second detention by the third defendant under s 4(1) of the POPOC tantamount to a contempt of court. I had attempted to demonstrate that ss 7C and 7D of the POPOC provided the platform for the plaintiff to challenge the detention order via a habeas corpus and the said challenge must only be limited to the issue of non compliance of procedural requirement. These sections precluded the plaintiff from challenging the third defendant's satisfaction and/or decision which justified to make the detention order under s 4(1) of the POPOC. This had been clearly demonstrated in the case of *Gunasingam a/l Kolasegaran dan lain-lain lwn Timbalan Menteri Keselamatan Dalam Negeri Malaysia dan lain-lain* [2006] 2 MLJ 363 where the court held that the court is not vested with the jurisdiction to review the third defendant's satisfaction in making the order and/or the third defendant's decision under s 4(1) of the POPOC even if the said order was based on the same facts and grounds for which the plaintiff was detained in respect of the first detention. So long as the Minister was satisfied there were grounds to justify the plaintiff's second detention under s 4(1) of the POPOC, his decision was not subject to challenge. In *Kerajaan Malaysia & 2 Ors v Nasharuddin bin Nasir* [2004] 1 CLJ 81 the court held:

> Whether or not the allegations in the said report on which the s. 8 detention order was based, were sufficient or relevant, was a matter to be decided solely by the Minister. In this case, he was satisfied, on a subjective basis, that the respondent's activities had threatened national security. It was therefore not open to the court to examine the sufficiency or relevance of the allegations contained in the report ...

**[49]** In view of the fact that the court was not vested with the power to question the third defendant's satisfaction or reasons to make the second detention order under s 4(1) of the POPOC based on the same facts and grounds as the first detention order, the Seconddetention order though was based on the same facts and grounds as the first detention order could not be said to be an abuse of the court process or a contempt of court as claimed by the plaintiff.

Therefore the plaintiff's second detention order was valid and enforceable until it was revoked on 10 April 2007.

*Was there element of mala fide*

**[50]** As to the reason that the plaintiff's re-arrest was tainted with element of mala fide the law had placed the onus to prove the element of mala fide on the plaintiff. The plaintiff had not shown proof of existence of mala fide on the part of the defendants in all acts pertaining to the plaintiff's arrest, re-arrest and detention. In order to succeed the plaintiff had to show improper and bad motive and a mere suspicion would not suffice. In *Yeap Hock Seng @ Ah Seng v*

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*Minister of Home Affairs, Malaysia & Ors* [1975] 2 MLJ 279 the court reiterated that the onus of proving mala fide on the part of the detaining authority is normally difficult to discharge as the applicant was required to prove improper or bad motive to invalidate the detention order. Based on the evidence adduced during the trial the plaintiff had not discharged the onus of proving mala fide on the part of the defendants.

*Whether the plaintiff's second arrest tantamount to res judicata*

**[51]** The challenge of the third defendant's decision by way of a writ of habeas corpus only relate to non compliance of procedural requirement stipulated in POPOC and did not affect the merits of the third defendant's satisfaction in masking the second detention order.

**[52]** In order for a doctrine of res judicata to apply, the same issue must have been raised and decided in an earlier proceeding or action in which the parties were represented. It is not opened for the same issues to be litigated twice. This doctrine is based on public policy that there must be finality in judicial decisions. What amounts to res judicata had been well illustrated by the Federal Court in the case of *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189; [1995] 3 CLJ 783 where the court held that:

> What is res judicata? It simply means a matter adjudged, and its significance lies in its effect of creating an estoppel per rem judicature. When a matter between two parties has been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the res judicata, because the judgment becomes the truth between such parties, or in other words, the parties should accept it as the truth; *res judicata pro veritate accipitur.* The public policy of the law is that it is in the public interest that there should be finality in litigation — *interest rei publicae ut sit finis litium.* It is only just that no one ought to be vexed twice for the same cause of action — *nemo debit bis vexari pro eadem causa.* Both maxims are rationales for the doctrine of res judicata, but earlier maxim has the further elevated status of a question of public policy.

**[53]** In an old case of *Henderson v Henderson* (1843) 3 Hare 100, 67 ER 313 the court held:

> The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which belonged to the subject of litigation, and which the parties exercising reasonable diligent, might have brought forward at the time.

**[54]** The issue before the Johor Bahru High Court relate to procedural non-compliance and did not touch the merits of the third defendant's

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satisfaction to make the second detention order pursuant to s 4(1) of the POPOC. Therefore res judicata is a non-issue.

*Whether the proper party had been sued*

**[55]** The action brought by the plaintiff in this case was in tort or tort based, premised on the alleged act or omission of the police officers who are employed by the fourth defendant, as their principal. In a claim of this nature the public officers who were responsible for the alleged tortuous act must be cited as parties in the action. Section 5 of the Government Proceedings Act 1956 (Act 359) requires that the liability of the particular public officer whose act, or default or omission was in issue must be established before the fourth defendant could be made vicariously liable as principal. If the plaintiff succeeded in his claim against the said public officers only then would the fourth defendant be vicariously liable as principal.

**[56]** Pursuant to s 5 of Act 359, the liability of the fourth defendant could only be vicarious if the police officers were responsible for the alleged wrongdoing, act or omission or default, that is, the primary tortfeasors are named by the plaintiff as the defendants in the said action. The plaintiff would not be able to maintain a claim in tort against the fourth defendant as a primary tortfeasor unless it was established that the resultant damage was caused by the neglect or default on the part of the specified public officer in the course of his employment or acting within in the scope or the authority for which he was appointed. The law requires that the particular alleged tortfeasor must be identified and named in the writ and SOC.

**[57]** Section 6 of Act 359 states that 'No proceedings shall lie against the government by virtue of s 5 in respect of any act, neglect or default of any public officer, unless proceedings for damages in respect of such act, neglect or default would have lain against such officer personally'. In short this section provides that the fourth defendant shall not be vicariously liable for any wrongful acts, default and or omission committed by the public officers unless it was established that such an action could be laid and or maintained against the said public officers and that particular officers were named in the writ and statement of claim. The plaintiff had failed to cite the tortfeasors in his writ and SOC despite the fact that he was able to identify the person who had caused him to be arrested and detained. The plaintiff had even applied for subpoenas to be issued to secure the attendances of these officers in court but opted not to cite the tortfeasors in this action. The plaintiff in this action had not named the tortfeasors despite the fact that such officers had already been identified or could be identified or ascertained through the process of interrogatories had the plaintiff been diligent in the conduct of the case.

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**[58]** The plaintiff in this case had failed to cite and or identify and name the respective public officer whom the plaintiff alleged had committed the wrongdoings and or the tortuous act that caused the plaintiff to be illegally arrested and or detained. Hence the plaintiff had not complied with the statutory requirement provided by Act 359. As the respective officers were not identified and named as the defendants to the plaintiff's action the action could not proceed and must be dismissed.

(pl see *Haji Abd Rahman v Government of Malaysia & Anor* [1966] 2 MLJ 174; *Steven Phoa Cheng Loon & Ors v Highland Properties Sdn Bhd & Ors* [2000] 4 MLJ 200; *Kerajaan Malaysia & Ors v Lay Kee Tee & Ors* [2009] 1 MLJ 1; [2009] 1 CLJ 663.

**[59]** In regards to the issue of non compliance with the statutory requirement such as this, His Lordship Dato' James Foong (as His Lordship then was) held in *Steven Phoa Cheng Loon & Ors v Highland Properties Sdn Bhd & Ors* [2000] 4 MLJ 200 that 'such defects, in my opinion are too serious and fundamental for such proceedings against the Government to succeed; it must fail for non compliance of the legislative provisions'.

*Whether plaintiff was entitled to damages*

**[60]** Alternatively, in the event I am wrong in my appreciation and assessment of the evidence before me and should it be held that liability had been established, for the sake of completeness, I will now touch on the issue of damages claimed by the plaintiff. In regards the plaintiff's claim for special damages for loss of livelihood I am satisfied the plaintiff has not led evidence to prove that he was gainfully employed by Benteras Security (M) Sdn Bhd at the time he was arrested and or detained. As the plaintiff was claiming for special damages, the onus was on him to prove his actual loss or damages. The plaintiff had not tendered any proof nor provided any supporting documents to show that he had in fact incurred such losses as claimed by him. In this context, the plaintiff needed to be reminded of the basic cardinal tenets in proving his claim for damages. The classical dictum of Lord Goddard in *Bonham-Carter v Hyde Park Hotel Ltd* [1948] WN 89 which had been quoted in numerous Malaysian cases and reproduced below as follows:

> Plaintiff's must understand that if they bring actions for damages it is for them to prove their damages; it is not enough to write down the particulars, and so to speak, throw them at the head of the court, saying, 'This is what I have lost, I ask you to give me these damages'. They have to prove it.

(see the case of *Kapt (B) Haji Mohamad bin Ismail v Perwira Affin Bank Bhd* [2001] 5 MLJ 101; [2001] 5 CLJ 184; *Sunlite Textile Sdn Bhd v Motilal Realty Sdn Bhd (Part 2)* [2007] 5 MLJ 640; [2008] 7 CLJ 97; *Letrik Bandar*

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*Hup Heng Sdn Bhd v Wong Sai Hong* [2002] 5 MLJ 247; [2002] 5 CLJ 170).

**[61]** The plaintiff had also claimed for general, aggravated, exemplary and punitive damages to be assessed by the court. The principles and the categories of cases where the court could award damages of this nature had been illustrated in the case of *Rookes v Barnard* [1964] AC 1129 as follows:

(a) oppressive, arbitrary or unconstitutional acts by government servant;

(b) where the defendant's conduct had been calculated by him to make a profit for himself which might well exceed the compensation payable to the plaintiff; and

(c) where the award is expressly authorised by statute.

**[62]** In awarding the above types of damages, it is appropriate for the court to direct its mind to the way in which the defendants had behaved towards the plaintiff. It had to be a sum adequate to *punish the defendants for their outrageous conduct, to mark the court's disapproval of such conduct and to deter the defendants from repeating the same acts. The plaintiff must show some form of outrageous conduct involving intentional wrongdoing coupled with element of oppression, cynicism or flagrancy* on the part of the tortfeasors. The *test of outrageousness* had been established in the Privy Council case of *A v Bottrill* [2003] 1 AC 449 at p 456 where the said court held as follows:

> Cases satisfying the test of outrageousness will usually involve intentional wrongdoing with, additionally, an element of flagrancy or cynicism or oppression or the like; something additional rendering the wrongdoing or the manner or circumstances in which it was committed particularly appalling.

**[63]** The plaintiff before me had not satisfied the test enunciated in the above quoted cases to deserve these damages to be awarded by this court. There was no evidence adduced during the trial to show presence of elements of outrageousness, oppression or intentional wrongdoing on the part of the defendants. The plaintiff too had not shown the manner or circumstances in which the acts were said to be *particularly appalling* as illustrated in the above cited cases.

**[64]** The principle in *Rookes v Barnard* is to *catch oppressive physical acts that are outrageous in nature and not the effect of the acts*. It could be seen from the facts of this case the defendants were merely exercising their powers statutorily provided by POPOC. As the plaintiff had not shown evidence of oppressive physical acts and/or intentional wrongdoing, the test enunciated in the above quoted cases had not been satisfied by the plaintiff.

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**[65]** However in the event liability is established I would award nominal damages to the plaintiff within the range of between RM10,000 to RM12,000.

**[66]** Based on the foregoing I would answer the issues posed for this court's determination in this manner:

(a) whether the detention of the plaintiff from 5 December 2006 to 10 April 2007 amounted to a wrongful detention and a contempt of the court order — the answer is No;

(b) whether the plaintiff is entitled to aggravated and/or exemplary and/or punitive damages — the answer is No;

(c) whether it had been proved that the first defendant had informed the police about the release of the plaintiff pursuant to the order of the court dated 29 November 2006 and whether the first defendant had delayed in releasing the plaintiff and/or whether the first defendant and or his agent had handed over the plaintiff to the police — the answer is Not proved;

(d) whether the re-arrest of the plaintiff under s 3(1) of the POPOC by the second defendant and the continuous detention of the plaintiff from 5 December 2006 to 18 January 2007 in the police lock up at the Johor Bahru, Central Police Station was illegal and an act in excess of the powers conferred by the law and a contempt of the court order — the answer is No;

(e) whether there were breaches of arts 5, 7, and 151 of the Federal Constitution, in that, the detention of the plaintiff from 5 December 2006 to 10 April 2007 was illegal and not in compliance with the requirement of the law and an action tainted with mala fide without fresh evidence having been produced and tantamount to a double jeopardy — the answer is No;

(f) whether the plaintiff's detention by the third defendant was protected under s 7D of the POPOC — the answer is Yes;

(g) whether the fourth defendant was the employer of the first, second, and third defendants — the answer is Yes in respect of the first and second defendants only;

(h) whether the third defendant was vested with the powers under s 4(1) of the POPOC to issue the detention order based on the old grounds, facts, file and inquiry report. This was because the first detention order which was based on the same facts had been declared as null and void by the Johor Bahru High Court on 29 November 2006 — the answer is Yes.

*Issues in C2*

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(i) whether the third defendant is the employer of the second defendant and vicariously liable for the acts of the second defendant — the answer is No;

(j) whether the plaintiff ought to have challenged the detention order dated 19 January 2007 by way of judicial review as provided under s 7C of the POPOC — the answer is Yes but limited to procedural non-compliance;

(k) whether the detention order issued by the third defendant from 3 April 2006 to 5 December 2006 and further detention from 19 January 2007 to 10 April 2007 was protected by s 7D of the POPOC and could not be challenged via this writ action — The answer is Yes.

## CONCLUSION

**[67]** On the totality of the evidence adduced by the plaintiff and the defendants both testimonial and documentary and having evaluated the evidence before me, I am satisfied the plaintiff had failed to discharge the onus of establishing his pleaded case against the defendants on the balance of probabilities. Hence the plaintiff's claim was dismissed with costs. In arriving at the above decision I had carefully considered the evidence adduced by the plaintiff and the defendants both testimonial as well as documentary, the submissions by both learned counsel of the plaintiff and the defendants respectively and the authorities tendered in support of their respective submissions.

**[68]** Lastly I would like to express my sincere appreciation to both learned counsel who had diligently and professionally conducted the trial before me and assisted me with their well researched submissions to enable me to decide this case.

*Claim dismissed with costs.*

Reported by Afiq Mohamad Noor